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Supreme Court, U.S.
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No. 94-0417

In The

Supreme Court of the United States

October Term, 1994

BEATRICE RHEA MORRIS,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM A. BROWN
Southwestern Bell Telephone Company
One Bell Plaza, Room 2900
P.O. Box 655521
Dallas, Texas 75265-5521
(214) 464-3643 – Telephone
(214) 464-2250 – Telecopier
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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LIST OF ALL PARTIES

PETITIONER:

Beatrice Rhea Morris, a natural person.

RESPONDENT:

Southwestern Bell Telephone Company, a Missouri Corporation and a wholly owned subsidiary of Southwestern Bell Corporation, a Delaware Corporation

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STATEMENT OF THE CASE

A. Proceedings in the Courts Below

On October 2, 1992, Plaintiff Beatrice R. Morris ("Plaintiff") filed her Complaint. In the Complaint, Plaintiff sought to challenge her demotion which resulted from Defendant Southwestern Bell Telephone Company's ("Defendant") determination that Plaintiff misappropriated company funds for personal use. On December 24, 1992, Defendant received a summons, but no copy of a complaint, for a civil action pending in the United States District Court for the Northern District of Texas, Dallas

Division, being Civil Action File No. 3:92-CV-2043-R. On January 13, 1993, Defendant filed "Defendant Southwestern Bell Telephone Company's Special Appearance and Motion to Dismiss." This pleading included Defendant's original answer to Plaintiff's complaint, generally denying the allegations of that pleading.

On January 27, 1993, the district court entered an order, correcting any defect in service of Plaintiff's complaint and directing Defendant to file an answer within ten days of the date of that order. As Defendant had already filed its answer as part of its January 13, 1993, filing, Defendant believed itself to be in compliance with the district court's directive.

On April 14, 1993, the district court entered an order directing Defendant to file "a proper answer by April 23, 1993." On April 23, 1993, Defendant filed "Defendant Southwestern Bell Telephone Company's Original Answer."

On May 12, 1993, Defendant filed "Defendant Southwestern Bell Telephone Company's Motion for Summary Judgment." On August 31, 1993, the district court issued an opinion and entered an order granting Defendant's motion for summary judgment.

On September 15, 1993, Plaintiff filed "Plaintiff's Motion for Reconsideration and Brief." The record is clear that, in spite of Plaintiff's failure to respond timely to Defendant's motion for summary judgment, the district court considered all of Plaintiff's evidence and arguments offered in opposition to that motion. On September 27, 1993, the district court entered its order denying Plaintiff's motion for reconsideration.

On October 27, 1993, Plaintiff filed her Notice of Appeal. By Per Curiam Order filed March 22, 1994, the United States Fifth Circuit Court of Appeals affirmed the district court's judgment. By Per Curiam Order filed April 18, 1994, Plaintiff's Petition for Rehearing was denied.

B. Statement of Facts

In this case, Plaintiff seeks to judicially challenge her demotion. Plaintiff was demoted because she misappropriated company funds for personal use.

In August 1968, Plaintiff was hired by Defendant as a telephone operator, a nonmanagement position. In July 1981, she was promoted to a first line manager position. In January 1991, Plaintiff's immediate supervisor was second line manager Kim Orsak. A second line manager is also referred to as an area manager.

In January 1991, Ms. Orsak found that Plaintiff had improperly used company vouchers for non-company business, specifically for cab fares to go to and from work. Defendant deems using company vouchers to pay for personal business to be a violation of the company's Code of Business Conduct, Defendant's statement of principles governing the business and individual conduct of its employees. On January 29, 1991, Ms. Orsak advised Plaintiff that she should not use vouchers for personal business, specifically for cab fare to go to and from work. Ms. Orsak told Plaintiff that future use of vouchers for personal business (such as for cab fares to go to and from work) would result in her dismissal. Plaintiff stated that

she understood completely. Affidavit of Hardee Mill, Exhibit 1. *See*, Tab 3 of Appellee's Record Excerpts.

In May 1992, Ms. Orsak had discovered that, in violation of company policy, Plaintiff had again used a cab voucher for transportation from Plaintiff's residence to her place of work. After checking further, Ms. Orsak discovered similar vouchers used by Plaintiff for the following dates: January 2, 1992, February 17, 1992, March 19, 1992, and April 15, 1992. In addition, Ms. Orsak found two occurrences of the use of cab vouchers in 1991. All of these vouchers appeared to Ms. Orsak to be in violation of company policy and all occurred after Ms. Orsak's January 1991 warning to Plaintiff.

On May 5, 1992, Ms. Orsak held an investigatory interview with Plaintiff concerning her personal use of cab vouchers to go between home and work. A copy of the May 5, 1992, investigatory meeting is attached to the Affidavit of Hardee Mills as Exhibit 2. *See* Tab 3 of Appellee's Record Excerpts. In the May 5, 1992 meeting, Plaintiff again acknowledged that she understood that the use of cab vouchers was a violation of company rules. Despite the fact that Plaintiff had been warned in January 1991 that further use of cab vouchers would result in her dismissal, Plaintiff continued to use cab vouchers in violation of company policy. Documents filed by Plaintiff in support of her motion for reconsideration confirm Defendant's contentions. In her own summary of these events, dated May 5, 1992, Exhibit 5 to Plaintiff's motion for reconsideration, Plaintiff wrote:

> "Janet Sykes asked if Kim [Orsak] had instructed me to discontinue the use of cab slips in January of 91 why had I used them in 92. I

> told Janet that I did not have faith in what Kim had said because it had been my experience working with her that she was not familiar with Company procedures in most areas. Also, I had the use of cab slips in the past and no one had ever questioned me about. But, I did not use them often because I would always use my own transportation.
>
> "Janet asked further why I had not gotten clarification from someone else when [Kim] told me that I could no longer use them. I told Janet that I did [sic] see it being a serious situation. Therefore, I did not give it any more thought. Also, there was no discussion about cab slips from January 91 until today."

In view of Plaintiff's knowing and continued violation of company policy, Ms. Orsak decided to give Plaintiff a choice between taking a downgrade back to a nonmanagement operator position (a demotion) or retiring and receiving her service pension. *See*, Affidavit of Hardee Mills, Exhibit 2; Tab 3 of Appellee's Record Excerpts.

Plaintiff appealed Ms. Orsak's decision to the General Manager of Operator Services, Jerry Allison. Mr. Allison is a fifth line manager. On May 11, 1992, Plaintiff met with Mr. Allison and, in that meeting, Plaintiff explained that she did not take seriously Ms. Orsak's January 1991 warning not to misuse cab vouchers and she acknowledged that she knew that the use of cab vouchers was against company rules. *See*, Affidavit of Hardee Mills, Exhibit 3; Tab 3 of Appellee's Record Excerpts.

On May 12, 1992, Plaintiff was informed that Mr. Allison had decided to uphold Ms. Orsak's decision. A

copy of the May 11 meeting and the May 12 notification are attached to Hardee Mill's Affidavit, as Exhibits 3 and 4; Tab 3 of Appellee's Records Excerpt. Plaintiff decided to accept a downgrade and is still employed by Defendant.

Plaintiff was demoted for a violation of the Defendant's Code of Business Conduct and for misappropriation of company funds by using cab vouchers for personal business. This misappropriation of company funds took place in spite of a direct instruction to Plaintiff by her immediate supervisor not to use company vouchers for personal business, including cab fares to go to and from home and work.

As part of her motion for reconsideration, Plaintiff offered 22 exhibits, setting out the facts on which her claim of racial discrimination was allegedly based. *See*, Civil Docket Sheet entry 13: Motion with Memorandum in Support by Plaintiff Beatrice Rhea Morris for Reconsideration of Order, September 15, 1993. *See also*, Plaintiff's Brief in Support of Motion for Reconsideration: Tab 3, Plaintiff's Record Excerpts. Plaintiff's evidence did not raise a genuine issue of material fact for determination at trial and, in fact, supported Defendant's iteration of the material facts surrounding Plaintiff's demotion. As Defendant was still entitled as a matter of law to a judgment in its favor, the district court correctly denied Plaintiff's motion for reconsideration and sustained *de facto* its prior order granting Defendant's motion for summary judgment.

SUMMARY OF THE ARGUMENT

In granting Defendant's motion for summary judgment, the district court applied the appropriate standards set out in this Court's trilogy of cases for such motions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In affirming the district court, the decision of the Fifth Circuit Court of Appeals is not in conflict with decisions of other courts of appeal or with the applicable decisions of this Court. The district court did not depart from the accepted and usual course of judicial proceedings and, therefore, the court of appeals did not sanction any such departure. In applying federal law, both the district court and the court of appeals followed established Title VII precedents.

The district court did not err in granting summary judgment to Defendant on Plaintiff's claim for violation of Title VII on the basis of race because, as a matter of law, Plaintiff failed to produce any evidence that any other employees similarly situated were disciplined less severely. Further, Defendant was entitled to summary judgment because Plaintiff presented no evidence that Defendant's articulated reason for her demotion was a pretext for racial discrimination.

The district court did not err in failing to appoint legal counsel for Plaintiff. Plaintiff was not terminated and did not retire. At all times relevant to her claim (up to and including the present), Plaintiff has been a full time employee of Defendant and, therefore, has had the

resources to employ her own attorney. *See* Brief of Appellant Beatrice Rhea Morris, page 2, fn. 1. Further, appointment of counsel would not have altered the fact that Plaintiff had no evidence to support the essential elements of her claim or any evidence to rebut Defendant's articulation of its nondiscriminatory and legitimate reason for Plaintiff's demotion.

ARGUMENT

A. The district court did not fail to consider the appropriate factors in determining whether to appoint legal counsel and Plaintiff cannot show an abuse of discretion with respect to the district court's decision. Therefore, the decisions of the lower courts should be affirmed.

The circuit courts agree that there is no automatic right to the appointment of counsel under Title VII. *Gonzalez v. Carlin*, 907 F.2d 573, 579 (5th Cir. 1990). *See*, 42 U.S.C. § 2000e-5(f)(1) "Upon application by the complainant and in such circumstances as the court *may deem just*, the court *may* appoint an attorney for such complainant and *may* authorize the commencement of the action without the payment of fees, costs, or security." The decision to appoint rests within the sound discretion of the district court. *Id.* Thus, the standard on appeal is the abuse of discretion standard.

The circuit courts are also in agreement as to the factors that generally ought to be considered in determining whether to appoint counsel.

> District courts analyzing the merits of a Title VII plaintiff's request for counsel should consider: (1) the merits of the plaintiff's claims of discrimination; (2) the efforts taken by the plaintiff to obtain counsel; and (3) the plaintiff's financial ability to retain counsel.

Gonzalez, 907 F.2d at 580. *See also, Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982); *Darden v. Illinois Bell Telephone Company*, 797 F.2d 497, 500-501 (7th Cir. 1986); *Gadson v. Concord Hospital*, 966 F.2d 32, 35 (1st Cir. 1992).

The merits of this case do not support any contention that the district court abused its discretion in refusing to appoint counsel. The presence of counsel would not have provided evidence that did not exist. There is simply no evidence that any of Defendant's employees were treated less severely under the same or similar circumstances and there is no evidence that Defendant's articulated reason for Plaintiff's demotion was merely a smoke screen for illegal employment discrimination.

Plaintiff admitted in her brief to the Fifth Circuit Court of Appeals that she was and is fully employed by Defendant. *See*, Appellant's Brief, page 2, fn. 1. As Plaintiff had the financial ability to retain counsel (or did not show that she was not financially unable to retain counsel), the district court's decision ought to be upheld as there is no evidence that the district court abused its discretion.

The generally accepted factors for analyzing a request to appoint counsel under Title VII do not support the appointment of counsel in this case. At a minimum, the merits of Plaintiff's claims of discrimination would

not support such an appointment. The district court reached the correct decision in granting Defendant's Motion for Summary Judgment, after a full review of Plaintiff's evidence. Moreover, Plaintiff's financial ability to retain counsel would not support such an appointment, either. There is simply no evidence that would support a contention that the district court abused its discretion in failing to appoint counsel.

B. The district court did not fail to consider any competent evidence and, therefore, the decisions of the lower courts should be affirmed.

The district court appropriately granted summary judgment because Plaintiff produced no evidence to raise a genuine issue of material fact with respect to an essential element of Plaintiff's *prima facie* case of discrimination under Title VII and because Plaintiff presented no evidence to rebut Defendant's articulation of a legitimate, nondiscriminatory reason for Plaintiff's demotion.

Under Title VII, in order to present a *prima facie* case of disparate treatment, Plaintiff must show (l) that she is a member in a protected class of persons; (2) that she performed satisfactorily in her position; (3) that she was disciplined (in this case, demoted) despite her satisfactory performance; and (4) that, under the same or similar circumstances, other employees (not in the protected class) were disciplined less severely. *See, McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 575 (1978). Plaintiff cannot and did not proffer any evidence raising a genuine issue of material fact on the question of whether there

were other of Defendant's employees similarly situated who were treated less severely than she. Because there is no evidence of this essential element of Plaintiff's *prima facie* case, summary judgment was properly granted. *Celotex*, 477 U.S. at 323.

In addition, an employer may rebut a plaintiff's *prima facie* case by articulating a legitimate, non-discriminatory explanation for the alleged discriminatory action. The plaintiff then has the burden of proffering competent evidence which raises a genuine issue of material fact that the articulated reason is merely a pretext for racial discrimination. Defendant articulated a legitimate, non-discriminatory explanation for the discipline, to-wit: Plaintiff's misconduct. Plaintiff was demoted because of a clear and flagrant violation of company rules and misuse of company funds *after* being informed that further use of taxi cabs for personal business at the company's expense would result in termination.

In the instant case, there is no evidence that, in demoting Plaintiff, Defendant was motivated by Plaintiff's race. The evidence is to the contrary. Defendant disciplined Plaintiff because of misconduct involving a violation of the Defendant's Code of Business Conduct; specifically, Plaintiff's misappropriation of company funds for personal use. Defendant's decision to discipline Plaintiff was taken only after an express warning to Plaintiff that further use of taxi cabs at company expense would result in her termination. In spite of this warning, Plaintiff continued to use cab vouchers for personal business.

Although Defendant was not obligated by law or contract to provide Plaintiff any further due process, the

decision to offer Plaintiff a choice between demotion and retirement was appealed by Plaintiff to higher management. After an investigatory meeting with Plaintiff's fifth line manager in which Plaintiff was permitted to argue her case, the decision to discipline Plaintiff for her misappropriation of company funds was upheld.

CONCLUSION

The lower courts have correctly applied established Title VII precedents and have used the appropriate standard for granting motions for summary judgment. The record is clear that the district court considered all competent evidence submitted by the parties in support of and in opposition to the dispositive motions made the basis of Plaintiff's petition.

Summary judgment was granted in Defendant's favor because Plaintiff failed to produce any evidence that any of Defendant's other employees similarly situated were disciplined less severely than Plaintiff and because Plaintiff failed to produce any evidence raising a genuine issue of material fact on the question of whether Defendant's articulated legitimate, nondiscriminatory reason for demoting Plaintiff was a pretext for racial discrimination.

For these reasons, this Court should deny Plaintiff's Petition for Writ of Certiorari, affirming the judgments of the lower courts.

Respectfully submitted,

WILLIAM A. BROWN
State of Texas Bar No. 03181010
One Bell Plaza, Room 2900
P. O. Box 655521
Dallas, Texas 75265-5521
(214) 464-3643 - Telephone
(214) 464-2250 - Telecopier

Counsel for Respondent